Limitations on Legislative Override under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values

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LIMITATIONS ON LEGISLATIVE OVERRIDE UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A MATTER OF BALANCING VALUES

By DANIEL J. ARBESS*

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I. INTRODUCTION

The structure of the Canadian constitution has ensured that for the past century, Canadian courts have rarely been constrained to deal directly with issues of civil liberties. Instead, they have functioned within a framework characterized by a single level of inquiry directed toward the determination of legislative jurisdiction between the co-existing levels of government which form the constituency of federalism. With the exception of the occasional dicta of individual justices suggesting that certain matters lay entirely beyond the legislative competence of either level of government, the courts' concern with civil liberties has been limited to an inquiry as to which level possessed the jurisdiction to abridge them. Legislation restricting fundamental freedoms has been struck down not on the basis that it interfered with fundamental freedoms but because it trespassed upon the powers of the competent legislative authority. Such was the nature of the system of exhaustive distribution of powers.

The passage of the Canada Act 1982 undoubtedly alters the system of judicial review by adding to the agenda of the courts two additional levels of inquiry, each implicit in the Canadian Charter of Rights and Freedoms. First, a court must determine whether an otherwise valid enactment limits the rights and freedoms protected by the Charter and constitutionally entrenched as part of the supreme law of Canada. Second, the court will inquire as to whether a valid enactment which limits the rights and freedoms enumerated in the Charter might nevertheless be the sort permitted by the very terms of the Charter itself. The limitations which are permitted by the Charter are set out in two separate provisions. The first, section 1, guarantees the rights and freedoms enumerated in the Charter subject

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2 Professor Weiler neatly summed up the state of rights and freedoms protections under the system of exhaustive distribution of powers by stating that in the absence of an entrenched Bill of Rights the only question is "which jurisdiction should have power to work the injustice, not whether the injustice should be prohibited completely." See The Supreme Court and the Law of Canadian Federalism (1973), 23 U. of T. L.J. 307 at 344.


4 1982, c. 11 (U.K.) [hereinafter Canada Act].

5 The Canadian Charter of Rights and Freedoms (hereinafter referred to as the Charter) is Part I (ss. 1-34) of the Constitution Act, 1982 which is Sched. B of the Canada Act 1982, c. 11 (U.K.) [hereinafter The Charter].

only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."7 The second, a legislative override privilege found in section 33, provides that:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).8

Perhaps the most difficult issue facing a court in interpreting the Charter is in determining the interplay between rights which are constitutionally protected and equally entrenched provisions limiting and overriding those rights. Several commentators have already expressed the opinion that the Charter represents a compromise between the entrenchment of basic rights and the previous system of parliamentary supremacy. This view asserts that the rights and freedoms entrenched in sections 2 and 7 to 159 remain protected as part of the supreme law of Canada unless and until the supremacy of the representative legislative body is asserted in an enactment authorized by section 33. Once Parliament or a legislature has made a declaration under section 33, the right referred to in the declaration may be abrogated by the enactment to which the non obstante declaration applies.10 Presumably, the annexation of a notwithstanding provision to a legislative enactment would, under this interpretation, be a legislative "last word" which would be free from judicial review.

The position to be advanced in this article takes exception to that view. The language of the Charter embodies at least two sets of fundamental com-

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7 The Charter, supra note 5, s. 1.
8 The Charter, supra note 5, s. 33.
9 Section 2 states that every Canadian citizen has the following fundamental freedoms: (a) conscience and religion, (b) thought, belief, opinion and expression, (c) peaceful assembly and (d) association. Sections 7 to 14 list the legal rights: to life, liberty and security of person (s. 7), to security against unreasonable search and seizure (s. 8), not to be arbitrarily detained or imprisoned (s. 9), [rights on arrest or detention] (s. 10), [right with respect to proceedings in criminal and penal matters] (s. 11), not to be subjected to cruel and unusual treatment or punishment (s. 12), of a witness not to have incriminating testimony given used to incriminate him (s. 13), and to the assistance of an interpreter in any proceedings (s. 14). Section 15 states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.
10 See, e.g., Marx, "Entrenchment, Limitations and Non-Obstante" in Beaudoin and Tarnopolsky eds., supra note 1 at 71; Scott, Entrenchment By Executive Action: A Partial Solution to Legislative Override (1982), 4 Supreme Court L.R. 303; Lyon, The Teleological Mandate of the Fundamental Freedoms Guarantee: What to do with Vague but Meaningful Generalities (1982), 4 Supreme Court L.R. 57 at 73.
community values or expectations. The first is that individuals and minorities possess basic rights and freedoms. The second is that Parliament and the legislators retain the prerogative of acting on behalf of the majority in certain circumstances, even if individual and minority rights are compromised. The Charter may therefore be regarded as protecting two basic but often conflicting values which must be appropriately balanced by any court faced with challenged legislation.\textsuperscript{11}

If the courts permit the legislative bodies to invoke section 33 to override the rights and freedoms to which it applies in all circumstances, even when such use of section 33 would shield indiscriminate and capricious restrictions, the initial value of entrenchment of those rights would be frustrated. Moreover, such an interpretation of the Charter would lead to the anomaly that certain rights, for example the right to vote,\textsuperscript{12} would remain entrenched and protected by the courts while others, such as the right to exercise an informed vote through the maintenance of freedom of the press and expression\textsuperscript{13} would be subject to arbitrary abrogation.

Furthermore, if the fact of entrenchment has any significance at all, it is in representing a movement away from the model of parliamentary supremacy in which rights and freedoms represent the residue of unrestricted activity, toward a “rights-oriented” model in which legislative competence is limited by the protection of fundamental rights and freedoms. Under such a model it is the courts, not the legislatures, which must ultimately determine the balance between individual rights and freedoms and majority will.

This article will examine several methods available to the courts by which enactments made under section 33 may be judicially monitored to ensure that the power to override the rights enumerated in sections 2 and 7 to 15 remains less than an absolute power to undermine completely the entrenchment of those rights and freedoms. These alternatives will be considered, wherever applicable, in the context of \textit{Bill 62},\textsuperscript{14} an enactment of the province of Quebec purporting to employ section 33 as broadly as is logically possible. It will be argued that \textit{Bill 62} constitutes an invocation of section 33 which must be invalidated.\textsuperscript{15}

II. THE NATURE OF \textit{BILL 62}

\textit{Bill 62} was assented to by the National Assembly of Quebec on June 23, 1982.\textsuperscript{16} The purposes and objectives of the legislation are enumerated in the explanatory preamble to the Act. The primary objective of the Act is to include, in each of the acts existing at the time of the proclamation of the \textit{Charter of

\begin{itemize}
\item \textsuperscript{11} See text accompanying notes 30-32, infra.
\item \textsuperscript{12} The Charter, \textit{supra} note 5, s. 3.
\item \textsuperscript{13} The Charter, \textit{supra} note 5, s. 2.
\item \textsuperscript{14} \textit{An Act Respecting the Constitution Act, 1982}, S.Q. 1981-82 (3rd. Sess.) [hereinafter referred to as \textit{Bill 62}].
\item \textsuperscript{15} As this article goes to the galley stage the constitutionality of \textit{Bill 62} is being challenged in the Quebec courts.
\item \textsuperscript{16} \textit{Supra} note 14.
\end{itemize}
Rights and Freedoms, an express declaration that it should operate notwithstanding sections 2 and 7 to 15 of the Charter. The brief text of Bill 62 is as follows:

Bill 62
An Act respecting the Constitution Act, 1982
HER MAJESTY, with the advice and consent of the National Assembly of Québec, enacts as follows:

DIVISION I
PROVISIONS RELATING TO SECTION 33 OF THE CONSTITUTION ACT, 1982

1. Each of the Acts adopted before 17 April 1982 is replaced by the text of each of them as they existed at that date, after being amended by the addition, at the end and as a separate section, of the following:

"This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Insert here the reference to the chapter number of the Canada Act in the compilation of the Acts of the Parliament of the United Kingdom for 1982)."

The text so amended of each of these Acts constitutes a separate Act.

No such Act is to be construed as new law except for the purposes of section 33 of the Constitution Act, 1982; for all other purposes, it has force of law as if it were a consolidation of the Act it replaces.

Every provision of such an Act shall have effect from the date the provision it replaces took effect or is to take effect.

Such an Act must be cited in the same manner as the Act it replaces.

2. Each of the Acts adopted between 17 April 1982 and 23 June 1982 is replaced by the text of each of them as they existed on 23 June 1982, after being amended by the addition, at the end and as a separate section, of the derogatory provision set out in the first paragraph of section 1.

The third, fourth and fifth paragraphs of section 1 apply, mutatis mutandis, to the Acts referred to in the first paragraph.

3. The formalities respecting the printing and distribution of the Acts do not apply to an Act enacted under section 1, to the extent that such formalities have already been observed in respect of the Act it replaces.

The same holds true in respect of an Act enacted under section 2.

DIVISION II
PROVISION RELATING TO SECTION 59 OF THE CONSTITUTION ACT, 1982

4. The Government shall not authorize a proclamation under subsection 1 of section 59 of the Constitution Act, 1982 without obtaining the prior consent of the National Assembly of Québec.

DIVISION III
FINAL PROVISIONS

5. This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982.

6. The sanction of this Act is valid for each of the Acts enacted under section 1 or 2.

7. This Act comes into force on the day of its sanction.

However, section 1 and the first paragraph of section 3 have effect from 17 April 1982; section 2 and the second paragraph of section 3 have effect from the date from which each of the Acts replaced under section 2 came into force.

The primary purpose of the legislation, as stated in the preamble, is to preserve the powers of the National Assembly of Québec and to maintain the operation of the Quebec Charter of Human Rights and Freedoms. This pur-

17 R.S.Q. 1977, c. C-12 [hereinafter the Quebec Charter].
Override Limitations and Bill 62

pose is executed by section 1 of the Act which replaces the text of each Quebec Act as it existed on April 17, 1982, with the same text, accompanied by the blanket non obstante provision.

A secondary purpose relates to the power granted, under section 59(2) of the Canada Act 1982, to the legislative assembly or the government of Quebec to authorize a proclamation under section 59(1) by which the language-of-education guarantees in section 23(1)(a) of the Charter would come into force with respect to Quebec. Section 4 of the Act provides that the government shall not authorize such a proclamation without first having obtained the consent of the National Assembly.

The validity of section 4 is questionable at the outset. Section 59(2) is a constitutional provision which details the possible means by which authorization might be obtained from the province of Quebec. An authorization may be obtained from either the legislative assembly or the government of Quebec. In Attorney General of Quebec v. Blaikie, the Supreme Court of Canada recognized the government of a province as a separate constitutional entity with its own status not subordinate to the legislature. It is therefore clear that section 59(2) contemplates two separate ways in which a proclamation may be authorized by Quebec. By requiring the consent of the National Assembly, section 4 of Bill 62 purports to eliminate one of these possibilities. This point becomes particularly significant when one considers the hypothetical situation in which, acting under section 59(2), a minority government lacking control of the National Assembly attempts to authorize a proclamation. There seems to be little question that to the extent of this inconsistency between section 4 of Bill 62 and section 59(2) of the Canada Act 1982, section 4 would be rendered of no force and effect by virtue of section 52 of the Constitution Act, 1982.

Another preliminary issue concerns the scope of Bill 62, assuming that it is otherwise valid. The question is whether the Act applies to laws antedating Confederation which have not been adopted by the legislature. One such law is the Civil Code of Quebec. It is submitted that Bill 62 can have no effect on such laws. Section 33 authorizes Parliament or the legislatures to declare "in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 . . . ." (Emphasis added.) It does not authorize the annexation of a non obstante provision to any law which has not met the requirement of being adopted as an enactment of Parliament or a legislature. Therefore, where a section of the Civil Code conflicts with any provision in the Charter, the restriction imposed by it, or any other pre-Confederation law, must be proven to fall within the criteria of section 1 of the Charter. Otherwise, the provision may be struck down pursuant to section 52.

III. INHERENT LIMITATIONS ON SECTION 33

A. The Application of Section 1

1. The Textual Argument: Section 1 Applies to Legislation Fortified by Section 33.

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18 Canada Act, supra note 4.
19 The Charter, supra note 5.
The basic guarantee of rights and freedoms is found in section 1 of the Charter which states that:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.\(^{21}\)

This language indicates that section 1 both guarantees the rights and freedoms set out in the Charter and specifies the only type of limitations to be permitted. Only those limitations which satisfy the criteria of reasonableness and demonstrable justification and which are prescribed by law are consistent with the basic guarantee of rights and freedoms. Limits which fail to satisfy these criteria will be inconsistent with the Constitution of Canada and accordingly, as provided in section 52 of the *Constitution Act, 1982*,\(^{22}\) will be of no force and effect.

When section 33 has been employed its effect is to limit otherwise guaranteed rights. In fact, the legislative body would, in the normal course of affairs, resort to section 33 only to insulate restrictive legislation from the otherwise governing provisions of the Charter. The effect of the *non obstante* declaration would be to permit an enactment to remain in force notwithstanding that it conflicts with the constitutional provisions to which the declaration refers. As such, both the limits imposed by the supported legislation and the declaration sanctioning those limits must be regarded as falling within the meaning of a "limit...prescribed by law" for the purposes of section 1.

Nothing in the language of section 33 indicates that it should operate notwithstanding the criteria in section 1. The drafters of the Charter could easily have provided that section 33 was to operate "notwithstanding section 1" or "notwithstanding anything in this Charter." Alternatively, section 1 might have been adjusted to take account of section 33, perhaps by making an express exception to the basic guarantee such as "subject to a declaration passed under section 33 and such reasonable limits as are demonstrably justified...." \(^{23}\)

The list of sections to which section 33 applies is inclusive and exhaustive.\(^{23}\) The sphere of application of section 33 may thus be looked upon as limited to those sections specifically referred to therein. It is submitted that there is no more reason to infer that section 33 could have an overriding or chilling effect on section 1 than there would be to make the same inference about any other section not referred to in the text of section 33, including section 28.

That section 1 should be given a broad reading is supported by the judgement of Deschênes C.J.S.C. in *Québec Association of Protestant School Boards v. The Attorney-General of Quebec (No. 2).*\(^{24}\) In that case the

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\(^{21}\) The Charter, *supra* note 5, s. 1.

\(^{22}\) *Supra* note 6.

\(^{23}\) Section 33(1). See, text accompanying note 5, *supra*. In the earlier drafts of s. 33, s. 28 was included in the list of sections to which it would apply. In that situation, s. 33 was to apply to s. 28 only because that section was specifically referred to in the list in s. 33. When it was decided that s. 33 should not apply to s. 28, reference to the latter was deleted from the text of the former.

\(^{24}\) (1982), 140 D.L.R. (3d) 33 [hereinafter referred to as the *Protestant School Boards* case].
challengers to language of education provisions in Bill 101\textsuperscript{25} submitted that the province should not be permitted to rely on section 1 to prove that the legislation constituted a reasonable limit on the language of instruction right found in section 23(1)(b) of the Charter. In denying this submission and holding that section 1 should be applied to section 23 Deschênes C.J. stated that:

Section 1 is unambiguous in this regard and that on its face it applies generally to all rights and liberties enumerated in and guaranteed by the Charter. It would require, therefore, a particularly strong argument to lead to the conclusion that one or other of the provisions of the Charter would nevertheless be sheltered from the limitations allowed by section 1. (Translation)\textsuperscript{26}

2. Criticisms and Counter Arguments: The Calibrated Test of Reasonable Limits

There have been various arguments put forward denying the applicability of section 1 to section 33. An examination of each of these criticisms will serve as a background against which will be developed an effective method of applying the criteria of section 1 to legislation making use of the legislative override.

a) Section 1 Would Render Section 33 Ineffectual

Proponents of this argument believe that the imposition of the reasonableness standard of Section 1 would destroy the significance of section 33 by allowing Parliament or a legislature to impose no more of a restriction on the rights and freedoms in sections 2 and 7 to 15 than might be permitted under section 1 \textit{simpliciter}. They argue that the application of a reasonableness standard to an enactment protected by a \textit{non obstante} clause would carry with it judicially unmanageable standards because the courts would be incapable of distinguishing between the test to be applied before the addition of a \textit{non obstante} provision to the legislation and that to be applied after.

The argument for applying the section 1 framework posits that there are manageable standards which respond to the difference between a legislative provision not fortified by a notwithstanding clause and one which has had such a clause annexed to it. One such test, developed in a comment by Professor Slattery,\textsuperscript{27} will next be examined. This will be followed by the development of a calibrated system of “reasonable limits” analysis which recognizes differing standards of review to be applied to restrictive legislation before and after it has been fortified by a declaration made under section 33.

(1) The Test of Reasonable Conformity

Professor Slattery commences with the same proposition as is being argued here: that legislation fortified by a Charter override provision must continue to fall within the “reasonable limits” required under section 1. His delineation between what constitutes a “reasonable limit” before section 33 has been invoked and what a reasonable limit would be if the legislation were fortified by an override declaration focuses on the propriety or reasonableness

\begin{footnotesize}
\begin{enumerate}
\item Charter of the French Language, R.S.Q. 1977 c. C-11 [hereinafter referred to as \textit{Bill 101}].
\item Protestant School Boards case, supra note 24, at 49.
\end{enumerate}
\end{footnotesize}
of the declaration itself within the context of the entire Charter. Where a section 33 declaration has been made in respect of a statute, Professor Slattery argues, a court must decide "whether it is reasonable and demonstrably justified in the circumstances that the statute should be exempted from judicial review for non-compliance with the relevant Charter provision"\(^{28}\) (Emphasis in original). Under this test the reviewing court will require proof that the declaration is reasonable in the sense that the statute, taking into account the presence of the notwithstanding provision, remains in "reasonable conformity"\(^{29}\) with the Charter provisions.

If the court finds that the restrictive provisions are not of the sort which might be reasonably recognized in a free and democratic society then it will substitute its view for that of Parliament or the legislature, striking down the section 33 declaration and the offensive legislation. If, conversely, the court finds that a reasonable individual reading the Charter provisions in light of section 1 would conclude that the statute is justified in a free and democratic society, the override declaration will be effective and the statute will be free of further judicial scrutiny. The legislature is given the opportunity to act as final judge of certain Charter provisions, subject to reasonable limits imposed by the court.

(2) The Calibrated Test of Reasonable Limits

The test to be developed here presupposes that the courts will scrutinize all legislation which restricts protected rights and freedoms, including legislation which has been fortified by declarations made under section 33. The courts will focus not on the reasonableness or justification of the declaration itself, but on whether the legislation which it fortifies constitutes a "reasonable limit" which would be "demonstrably justified in a free and democratic society". Only legislation which, notwithstanding a declaration under section 33, would be adjudged to be consistent with all of the elements of the basic guarantee in section 1 would be permitted to override the Charter sections to which the declaration refers; only such legislative provisions would operate notwithstanding the sections referred to in the declaration.

In order to examine properly restrictive provisions under section 1 both before and after they are bolstered with an override declaration, the courts must develop a test of reasonableness and demonstrable justification which is capable of being calibrated to recognize that legislation which has been made the subject of a declaration under section 33 must be accorded less stringent scrutiny. An examination of how section 1 might be interpreted by reference to early decisions which examine it, and by reference to how similar clauses have been interpreted in other democratic societies, provides a helpful introduction to a framework of reasonable limits analysis which might subsequently be modified to provide for the variable calibration test suggested here.

(a) The Burden and Standard of Proof Under Section 1 Generally

There seems to be little doubt that a party seeking judicial relief from a violation of protected rights and freedoms must bear the initial burden of

\(^{28}\) Id. at 393.

\(^{29}\) Id. at 394.
proving such a violation. Once an infringement has been proven, however, to the extent that the government seeks to rely upon section 1, it has the burden of proving that the restrictive provisions are such as would be both "reasonable" and "demonstrably justified" in a "free and democratic society".  

The phrase "demonstrably justified" has been interpreted as placing on the party seeking to rely on section 1 the burden of proving the justice or reasonableness of the limitation. In justifying a limitation, a legislative body must first prove that the object of the restrictive provisions is one which is related to the head of power under which the legislation would be upheld in a division of powers determination. As well, the government must demonstrate that the object is one which would be appropriately pursued in a "free and democratic society".

It is at this stage in the analysis that the courts must balance the rights and freedoms of the individual with the interests of the majority. In considering whether the object of the restrictive legislation is one which is justified in a free and democratic society, the reviewing court must weigh the nature of the right and the gravity of the consequences of its limitation or abrogation against some interest of the state which purportedly necessitates a limitation of the right.

The requirement that "demonstrably justified" limits must be "reasonable" as well implies that once the government has demonstrated that the object is of sufficient importance to justify some infringement, it must further demonstrate that the means of attaining that object, the limits themselves, are reasonable. In determining what might constitute a "reasonable limit" the court might refer to a number of cases interpreting similar clauses in other "democratic" societies.

The European Convention For the Protection of Human Rights And Fundamental Freedoms 1950 contains provisions almost identical to section 1 of the Charter. Unlike the Charter, however the Convention has differing reservations attached to the various rights protected. The restrictive clauses are found in Article I of the First Protocol to the Convention and in Articles 8, 9, 10, and 11 of the Convention. Article 10(1), for example, guarantees freedom of expression. However, the right is subject to limitations imposed by section 10(2) which provides that:

The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society . . . .

In the Handyside case the complainant had been convicted in the United Kingdom under the Obscene Publications Act 1964. In deciding whether the measures in dispute were "necessary in a democratic society" the Commission held that "[r]estrictions on that freedom must be proportionate to the aim pur-
sued and the court must decide whether the reasons given by the national authorities for their actions are relevant and sufficient.\textsuperscript{34}

A similar approach was adopted by the \textit{Commission} in the \textit{Sunday Times Case}.\textsuperscript{35} The appeal was against an injunction upheld by the House of Lords restraining the complainant from publishing an article relating to a pending action. The Commission held that the means employed to carry out the government’s objective in maintaining the authority of the judiciary

\... did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression \... was not proportionate to the legislative aim pursued and, hence, was not necessary in a democratic society for maintaining the authority of the judiciary \... \textsuperscript{36}

The \textit{Commission} concluded that there had been a violation of the complainant’s Article 10 right which went beyond the permissible limitation in Article 10(2).

A commensurate analytical framework has been applied in cases decided under Article 19(1) of the \textit{Constitution of India}\textsuperscript{37} which protects the fundamental rights of freedom of speech and expression, peaceable assembly, mobility, and association. Those rights are guaranteed subject to “reasonable limits” found in subsections (2) through (6).\textsuperscript{38} These reasonable limits may be invoked in the interest of, \textit{inter alia}, “public order, decency, or morality”,\textsuperscript{39} “the security of the state”,\textsuperscript{40} and “the general public”.\textsuperscript{41}

A “reasonable limit” has been interpreted in the Indian context as being one which is directly related to the object sought to be achieved by the legislation, and which is not broader than is necessary to fulfill that object.\textsuperscript{42} Thus, in the recent case of \textit{Pathumma v. State of Kerala}\textsuperscript{43} the Supreme Court of India stated that:

[T]here must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. \... If there is a direct nexus between the restriction and the object of the Act then a strong presumption in favour of the constitutionality of the Act will naturally arise.\textsuperscript{44}

The \textit{Pathumma} case was cited with approval by Deschênes C.J. in the \textit{Protestant School Boards} case.\textsuperscript{45} It formed a significant part of the rationale developed by the Court in its determination of what constitutes a “reasonable

\begin{thebibliography}{99}
\bibitem{34} Supra note 32, at 510.
\bibitem{36} Id. at 408.
\bibitem{38} Art. 19(2)-(6).
\bibitem{39} Art. 19(2).
\bibitem{40} Id.
\bibitem{41} Art. 19(6).
\bibitem{44} Id. at 778.
\bibitem{45} Protestant School Boards case, supra note 24, at 73.
\end{thebibliography}
limit" for the purposes of section 1 of the Charter. After a review of Pathum-
ma and other authorities cited above, the following conclusions were reached
with respect to the "reasonable limit" requirement in section 1:

1. A limit is reasonable if it is a proportionate means to obtain the purpose of the
law;
2. Proof of the contrary involves proof not only of a wrong, but of a wrong which
runs against common sense; and
3. The courts must not yield to the temptation of too readily substituting their
opinion for that of the Legislature. (Translation.)

Thus, a limit will be upheld as valid under section 1 if the party relying on
that section demonstrates both that the objective of the restrictive legislation is
one which would be appropriately pursued in a "free and democratic society", and
that the means by which the objective is attained are proportionate to the
objective itself.

The standard of proof has so far been interpreted as being a civil rather
than a criminal one. However, whereas in criminal prosecutions there is a
precise formula of proof beyond a reasonable doubt, there is no such formula
in civil cases. While it is generally established that the civil onus requires a par-
ty to establish his case on a balance of probabilities, whether a civil burden
has been discharged "must depend upon the totality of the circumstances on
which [a court's] judgment is formed including the gravity of the consequences
of the finding." Thus, the court should vary the standard of proof depending
upon the circumstances in each case, including the nature of the right infringed
and the gravity of the consequences of the infringement. Such an approach has
already been adopted by the Ontario Supreme Court in the case of Federal
Republic of Germany v. Rauca in which Evans C.J. stated:

Because the liberty of the subject is in issue, I am of the view that the evidence in
support must be clear and unequivocal. Any lesser standard would emasculate the
individual's rights now enshrined in the Constitution.

Similarly, the United States Supreme Court has applied varied standards
of scrutiny depending on the circumstances. At the one extreme, an exacting
standard has been developed through the identification of certain "preferred
rights" which are protected from any governmental limitation which is not
compellingly justified and whose means are not absolutely necessary to execute
the objective. For example, legislation aimed directly at the communicative

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46 Id. at 77.
47 Supra note 30, at 716.
48 Supra note 30, at 716.
49 Smith v. Smith and Smedman, [1952] 2 S.C.R. 312 at 331 per Cartwright, J. The
principle that within the balance of probabilities formula there are degrees of probabili-
ity which vary the overall degree of proof, depending on the circumstances, was again
recognized by the Supreme Court of Canada in Continental Insurance Co. v. Dalton
50 Supra note 30.
51 Id. at 716.
52 See, e.g., Murdock v. Penn., 319 U.S. 105 at 115 (1943), 63 S.Ct. 870 at 876;
impact of speech is presumptively unconstitutional unless justified by a "compelling state interest".\textsuperscript{53} Likewise, legislation which creates inequalities in distribution of benefits or burdens in a manner inconsistent with fundamental rights\textsuperscript{54} or, which creates classifications which "prejudice against discrete and insular minorities"\textsuperscript{55} will be subject to "strict scrutiny", requiring "pressing public necessity" to justify its existence.\textsuperscript{56}

In contrast, a presumption of validity and only "minimal judicial scrutiny"\textsuperscript{57} is applied to government legislation which is unconnected with the content of communication and which has only a minor effect on free speech. Similarly, in areas of complex economic legislation the courts will apply a relaxed standard of review, requiring only a rational basis for the restrictions, notwithstanding that fundamental freedoms might be affected.\textsuperscript{58}

Finally, American courts have developed a third standard of review known as "intermediate scrutiny".\textsuperscript{59} The courts will apply this standard when "important" though not quite "preferred" interests are at stake\textsuperscript{60} or if sensitive, but not necessarily suspect criteria of classification are employed in the legislation.\textsuperscript{61}

American cases will not be useful to Canadian courts insofar as apportionment of the burden of proving or disproving the justification of restrictive legislation is concerned, since section 1 clearly places that burden on the party seeking to rely on it. However, American authorities might help guide the court in determining the factors to be taken into account when establishing the standard of proof required to satisfy section 1 in a given situation.\textsuperscript{62}

Prior to an examination of how the analysis under section 1 might be modified to provide for judicial review of enactments employing section 33,

\textsuperscript{53} Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1978) at 580-82.

\textsuperscript{54} Id. at 1002.


\textsuperscript{56} United States v. Caroline Products Co., 304 U.S. 144 at 152-53 n. 4 (1938), 58 S.Ct. 778 at 783-84 n. 4, per Stone J.

\textsuperscript{57} Supra note 53, at 682-84.

\textsuperscript{58} See, e.g., Jefferson v. Hackney, 406 U.S. 535 at 546-47 (1976), 92 S.Ct. 1724 at 1731-32 (1976) (upholding a Texas welfare scheme affecting, but not directed towards, minority groups) per Renquist J.

\textsuperscript{59} Supra note 53, at 1090.

\textsuperscript{60} See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88 at 102-103, 96 S.Ct. 1895 at 1904-1905 (1976) (recognizing the eligibility for employment in a major sector of the economy as "of sufficient significance to be characterized as a deprivation of an interest in liberty" and therefore subjecting the legislation to more than minimal scrutiny).

\textsuperscript{61} Supra note 53.

\textsuperscript{62} In order to determine just how instructive American authorities will be in any particular situation a court should consider any differences in wording between the two documents, and the context in which the American doctrine being considered developed (see the dicta of Laskin J. in Curr v. R., [1972] S.C.R. 889). American authorities are referred to in this article not for the suggestion that the doctrines developed therein be entirely adopted into Canadian law, but as illustrative of certain elements which may be considered by the court in establishing the standard of scrutiny to be applied to the facts of a particular case.
the analytical framework developed thus far may be summarized. Once a *prima facie* infringement has been proven, the party seeking to rely on section 1 bears the burden of proving that the limit is "demonstrably justified" in the sense that it has been demonstrated that the object is to respond to a social need which is recognized as falling within the competence of the legislative body in a "free and democratic society" and "reasonable" in the sense that the limits themselves, as a mode of achieving the object, are proportionate or related to that object. The standard of proof or degree of scrutiny will vary depending on the nature of the right infringed, the seriousness of the infringement and the focus of the legislation.

(b) *The Burden and Standard of Proof When Section 33 Has Been Employed*

Application of the foregoing framework to enactments reinforced by a declaration under section 33 is simply a matter of varying the standard of review to be applied to the restrictive legislation. When a court is asked to consider restrictive legislation which has not been supported by an override provision, it will develop and apply an appropriate standard of review taking account of the factors referred to in the preceding section.

The court might slightly increase the standard of scrutiny when considering legislation which is restrictive of rights and freedoms to which an override provision could have been, but has not been added. It would do so on the basis that the phrase "free and democratic society" within the context of the Charter contemplates, but expressly requires the legislative assertion of, by declaration under section 33, an emphasis on the value of majoritarian democracy. In the absence of such an assertion by the legislative body, the court should recognize that there is to be an emphasis placed on the word "free" in section 1 and should apply a slightly more onerous standard of scrutiny to restrictive legislation.

Once Parliament or a legislature has so asserted its prerogative to restrict some individual right, a court should place the balance of emphasis on the term "democratic" in section 1. Accordingly, once a section 33 declaration has been made in respect of a statutory provision, the court would apply only minimal judicial scrutiny. The restrictive legislation would be "demonstrably justified" for the purposes of section 1 if the government adduced evidence proving that there is a rational basis upon which a legislative body in a society emphasizing majoritarian democracy, but still recognizing freedom, could act. The limits themselves would be "reasonable" so long as the means employed were shown to be rationally connected to the object sought to be attained. The purpose of the legislation must be achieved in some manner that is related, however loosely, to the restriction imposed.

A declaration made under section 33 would aid the legislative body most where the standard of scrutiny without such a declaration would be particularly stringent. In these situations there would be a significant decrease in the standard to the level of minimal scrutiny once section 33 has been employed, regardless of the stringency of the standard prior to the *non obstante* declaration. However, it is in these situations that extra-legal checks on the use of section 33 are likely to be most effective. If, for example, section 33 were used to fortify legislation restrictive of freedom of expression, the standard of judicial scrutiny would be lessened greatly from strict or close to strict scrutiny, de-
pending on the circumstances, to only minimal scrutiny. That decrease in judicial scrutiny would necessarily limit the court’s role in protecting the right of expression. However, the political outcry likely to result from the use of section 33 to override so fundamental a right would act as a deterrent to the legislative body.

Conversely, a declaration made under section 33 would be of little aid or necessity to Parliament or a legislature when its effect would be to fortify legislation which would not attract exacting judicial scrutiny even without a section 33 declaration. In these situations the standard of scrutiny would be approaching minimal in any case and a declaration made under section 33 would result in little, if any further decrease. Political pressure is not likely to be a factor since the legislative body will not be achieving significantly more from the use of section 33 than it could even without a non obstante declaration.

As an illustration of the operation of the calibrated test, consider a provincial enactment similar to that considered by the Supreme Court of Canada in Re Nova Scotia Board of Censors and McNeil. In that case the Nova Scotia Theatres and Amusements Act established the Amusements Regulation Board which was given broad discretion to prohibit and censor the exhibition of all films in the province. The Board evaluated films on the basis of content but without any established criteria by which acceptable films were distinguished from offensive ones.

Assuming that a challenger has proven that the Act prima facie infringes his right to free expression, the burden would lie on the government to satisfy the criteria of section 1. The court would first establish the standard of scrutiny to be applied. In view of the fact that the legislation restricts the fundamental right of free expression and does so on the basis of its content or communicative impact, the court would be likely to apply stringent scrutiny. In the absence of an express declaration under section 33 the court should not be reluctant to apply an even more exacting scrutiny.

Under these circumstances, the court would require clear evidence of a substantial social need before it would be satisfied that the provisions were “demonstrably justified”. Furthermore, even if justified, the scheme would constitute a “reasonable limit” only if it employed the least drastic means of achieving the purpose. Any restrictiveness beyond that which is absolutely necessary would violate section 1.

Applying this standard of scrutiny to the legislation, it is arguable that if there is a public interest motivating the legislation, it does not justify the gravity of the restriction on this fundamental right. However, even if such a scheme could be justified in a “free and democratic society” as necessary for the protection of children from explicit material, or for the maintenance of the social and moral fabric of the community, it seems clear that such a standardless system of prior restraint on expression would constitute an overly restrictive means of achieving the objective. As long as the objective could be achieved by

64 R.S.N.S. 1967, c. 304.
65 R.S.N.S. 1967, c. 304, s. 3.
employing a less restrictive alternative, for example, the establishment of a film classification board without censorship powers, the limits would be unreasonable.

Once the legislation has been fortified by a declaration under section 33, the reviewing court must apply only a minimal standard of scrutiny, according weighty deference to the term "democratic" in section 1 and therefore to the expressed will of the majority. However, the court must at the same time ensure that the legislation does not violate the basic guarantee of rights by frustrating the meaning of the word "free" in section 1. Under minimal scrutiny a limit will satisfy section 1 if the object is one which may be rationally pursued in a "free and democratic society" and only if there is a rational nexus between the means employed and the legislative ends. If the court finds that the protection of men's minds from unpopular expression cannot constitute a valid governmental objective in a society which values freedom as well as democracy, the legislation must fall. A similar result must ensue if the legislation is regarded as being so overly restrictive that the relevant provisions cannot be said to further in any rational manner the overall purpose of the legislation. Finally, if the court holds that limitations imposed under statutory authority but without any fixed criteria by an administrative tribunal are not "prescribed by law", the legislation must be invalidated for inconsistency with section 1.67

To summarize, legislation not fortified by a non obstante provision is subject to varied judicial scrutiny depending on the nature of the right infringed and the totality of the circumstances. When considering whether the limits imposed satisfy the criteria of section 1, the courts should not be reluctant to emphasize the word "free" in the phrase "free and democratic society", thereby applying slightly increased scrutiny to the enactment. Once a declaration under section 33 has been made, a reviewing court is directed to emphasize the word "democratic" in the above-mentioned phrase, paying deference to the asserted wishes of the democratic majority. Legislation supported by a non obstante declaration will be subject only to minimal scrutiny and must be upheld if the purpose is one which is not entirely inconsistent with the concept of freedom embodied in section 1, if the means are rationally related to the purpose and if the limiting provisions are "prescribed by law".

This calibration of the judicial standard of scrutiny provides a mechanism by which the courts can acknowledge the importance which Parliament or a


67 In Martineau v. Matsqui Institution Inmate Disciplinary Bd., [1978] I.S.C.R. 118, 74 D.L.R. (3d) 1, 14 N.R. 285, the court held, in a split decision, that administrative guidelines cannot constitute "law". See, however, the strong dissent of Laskin C.J.C. (with three other justices) and the comment by Janisch, What is "Law" — Directives of the Commission of Penitentiaries and Section 28 of the Federal Court Act — The Tip of the Iceberg of "Administrative Quasi-Legislation" (1977), 55 Can. B. Rev. 576. In Ontario Film and Video Appreciation Society v. Ontario Board of Censors (an unreported decision, March 25, 1983), the Ontario Divisional Court struck down censorship provisions of the Theatres Act, R.S.O. 1980, c. 498 on the basis that informal administrative guidelines not set out in the legislation and subject to the "whim of an official" fail to be "prescribed by law" for the purposes of section 1.
legislature attaches to an enactment, give due effect to each of the conflicting values of individual rights and effective majoritarian rule, as protected in the Charter, and scrutinize legislation which restricts protected rights and freedoms in a principled manner.

b) *Imposition of a Standard of Review is Contrary to the Intention of the Framers*

Critics of the imposition of judicial review under section 1 of enactments fortified by *non obstante* declarations argue that such an interpretation would frustrate the purpose of section 33 and would undermine the political process which culminated in the inclusion of an override section in the Charter. While it cannot be denied that the concession of the override provision was a major condition of provincial consent to the final constitutional package, any attempt by the courts to ascertain the intended scope of section 33 would almost certainly be more burdensome than beneficial.

A preliminary problem which would face a court would be in determining just whose intentions are relevant in this context. As Professor Slattery has pointed out,68 the *Canada Act 1982*69 is an enactment of the British Parliament passed at the request of the Senate and the House of Commons of Canada. An examination of what was intended by all relevant parties would lead the court into a quagmire of opinions and individual motivations of provincial premiers, members of the House and the Senate, committee members, civil servants, and even British Parliamentarians. It seems clear that such an exercise would be futile.

Furthermore, even if the examining court were able to ascertain whose intentions are relevant, it would be faced with difficult issues in determining how to enter such evidence into the record. Although the Supreme Court of Canada has enunciated a principle of flexibility governing the admissibility of extrinsic evidence in constitutional cases70 and has recently admitted various reports, papers and legislative debates for the purpose of defining the social and economic conditions underlying an enactment,71 it has never admitted such materials as an aid in construing the intended meaning of a constitutional provision. If even Hansard reports are of questionable admissibility in this context, there seems no reason why a court should be expected to admit statements of lesser reliability made to the press and other sources by various actors outside of Parliament.72
Finally, it is submitted that in interpreting the intended meaning of the provisions of the Charter the courts need not resort to the statements of individuals. In considering whether section 1 might have been intended to apply to section 33 enactments the courts should refer to the overall objectives of the Charter as evidenced by the language of the document itself. It cannot be denied that one of the results emanating from the language of the Charter is the alteration of the status quo by granting constitutional status to certain rights and freedoms. If section 33 were not made subject to rational limits, the objective of entrenchment would be frustrated. In the words of Viscount Simon L.C.:

We should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.\(^3\)

Any argument based on the presumed intention of the framers in inserting an override provision in the Charter should not be so fervently adhered to that it results in the neglect of the fundamental purpose of the Charter. Instead the courts must recognize and give effect to both intended purposes. They must, therefore, limit the override power by balancing the benefit sought to be gained through its use against the magnitude of the restriction placed on the enjoyment of a fundamental right. As was suggested above, this may be achieved and both purposes in the Charter may be balanced by requiring that the limits placed upon fundamental rights conform to the reasonableness standard already embodied in section 1.

c) The Effect of Section 33(2)

Professor Hogg argues that once a Charter provision has been overridden by an enactment which includes a notwithstanding provision, section 33(2) results in the removal of the statute or such portions as the non obstante provision refers to from the effect of the entire Charter, including section 1.\(^4\) Section 33(2) states:

fundamental freedoms, mobility rights, legal rights, equality rights and language rights are all enshrined in the Constitution and apply across the land.

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections to the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.


While the comments cited in the second paragraph of Mr. Chrétien’s statement appear to indicate that he thought the override clause gave Parliament and the legislatures the “final say”, his initial comments cited in the first paragraph stress the importance of considering the override provision within the overall context of a Charter of entrenched and judicially protected rights. It is arguable that the Justice Minister’s statement supports, rather than undermines the position that enactments reinforced by declarations under s. 33 should be made subject to judicial review. If Mr. Chrétien’s intention that the override power should not result in the emasculation of the rights in those sections of the Charter to which it applies is to be followed, it is the judiciary which must do so by reviewing overriding legislation.


\(^4\) Hogg, Canada Act 1982 Annotated (Toronto: Carswell, 1982) at 79.
An act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but of the provision of this Charter referred to in the declaration.  

With respect, it is submitted that this language does not support Professor Hogg's interpretation.

It is submitted that section 33(2) presupposes that "a declaration made under this section" is valid and merely prescribes the effect of such a declaration. It is at the stage at which the declaration is made that section 1 applies. If a declaration made under section 33(1) would have the effect of insulating legislation which is so restrictive as to fail to meet the standard of minimal judicial scrutiny to be applied under the calibrated test developed above, the declaration is invalid and does not reach the point in subsection 2 in which it would be operative. Only those declarations which would fortify legislative limits found to be "reasonable", "prescribed by law" and "demonstrably justified" by a court applying minimal scrutiny would take effect as valid and "made under this section" for the purpose of section 33(2).

3. Application of the Section 1 Criteria to Bill 62

Having considered the criticisms and come to the conclusion that section 1 provides a viable approach to be used by the courts in reviewing enactments made subject to section 33 declarations, the framework may now be applied to challenge the constitutionality of Bill 62. It may be recognized at the outset that the existence of an independent statute which directs the overriding of rights and freedoms by other statutes gives rise to two separate grounds of attack.

Normally a notwithstanding declaration will be made as part of a statute when it is enacted. The declaration will not be made in one statute to apply to another, as is the case with Bill 62. The applicant challenging a non obstante declaration in this regular situation would argue that the restrictions imposed by the legislation which has been fortified by a section 33 declaration violates section 1, notwithstanding the declaration. If the restrictive provisions fail to satisfy the minimal standard of scrutiny required in the circumstances, then the legislation itself and the declaration made therein would both be invalid.

If this more common approach were applied to enactments fortified by Bill 62, the attack on Bill 62 itself would be indirect. Once the applicant succeeded in having some legislation whose override provision was inserted by Bill 62 struck down, he could argue that Bill 62, as the source of the override declaration, should also fall.

The preferred approach in this unique situation in which the overriding limits are prescribed by an independent enactment, would be to challenge Bill 62 directly. The applicant would obtain standing by arguing that as an independent enactment prescribing override clauses in pre-existing legislation, Bill 62 itself constitutes a limit on the rights enumerated in sections 2 and 7 to 15 of the Charter. The Act itself constitutes a limit because in its absence all of the statutes to which it applies would be subject to more exacting scrutiny

75 The Charter, supra note 5.
76 Bill 62, supra note 14.
under section 1 and would therefore be more suspect. This overall decrease in
the standard of scrutiny resulting from Bill 62 results in an overall increase in
permissible limitations on the rights which would not otherwise have taken place.

Adopting this latter approach to challenge Bill 62, it must preliminarily be
determined that the legislation was validly enacted for the purposes of the divi-
sion of powers. At this stage the challenger will face the usual presumption of
constitutionality. His success will depend on how the legislation is
characterized by the reviewing court. If it can be proven that there is no basis
on which the legislation can be characterized as relating to a subject matter
falling within provincial jurisdiction, the matter will be determined.

The province might argue that it is seeking to exercise jurisdiction based
on a new legislative power derived from section 33 of the Charter. The argu-
ment would be that section 33 provides new subject matter in relation to which
both Parliament and the legislatures may legislate. The argument seems
unlikely to succeed in light of the clear language of section 31 of the Charter
which states that “Nothing in the Charter extends the legislative powers of any
body or authority.”

In the alternative, the province could argue that Bill 62 is an act to revise
the statutes of Quebec and, as such, should be looked upon as a matter of pro-
vincial housekeeping falling within the competence of the National Assembly.
This characterization would result in the legislation being upheld as relating to
a matter entirely within the legislative jurisdiction of the province.

The provisions of the Charter may then come into play. The onus remains
on the challenger to prove a prima facie infringement of a Charter right
resulting from the enactment of Bill 62. That onus would be discharged if he
were successful in establishing that, but for the decreased standard of scrutiny
resulting from Bill 62’s placement of a notwithstanding clause in some
legislative enactment, the enactment would be an unreasonable violation of a
protected right. For example, the applicant could argue that the decrease in
scrutiny of restrictive provisions in the province’s censorship laws caused by
Bill 62 is a restriction of his right to free expression because in the absence of a
non obstante provision in the legislation the provisions would be struck down
under section 1.

Once a prima facie case has been established, the government will seek to
invoke the provisions of section 1 to support the legislation. The issue to be
determined is whether the limitation imposed is a “reasonable” one “prescribed
by law”, which can be “demonstrably justified in a free and democratic socie-
ty”. The specific question which the court would have to decide is whether an
act amending all of the statutes of a province to include a provision, the pur-
pose of which is to override sections 2 and 7 to 15 of the Charter can constitute
a demonstrably justified, reasonable limit on those rights.

The legislature must first demonstrate that the purpose is one which is
related to the purpose for which the legislation was upheld under the division

77 See generally, Magnet, *The Presumption of Constitutionality* (1980), 18 Osgoode
Hall L.J. 87.
of powers and is one which is consistent with the values of freedom and democracy enshrined in section 1. One approach which the court might adopt would be to hold that there can be no justification, in a "free and democratic society" for the indiscriminate revision of the statutes to include non obstante provisions. Such reasoning would be based on a finding that section 1 requires a consideration of each particular legislative scheme to determine whether, in each separate circumstance, the limits imposed by the legislation were justified and reasonable.

Another approach which might be taken would be to allow the province to introduce some justification for the comprehensively restrictive Bill 62. The court would seek some factor or purpose motivating the legislation.

The first motivation for the enactment was explained by M. Bédard, the Minister of Justice for the Province of Quebec. During Committee hearings on Bill 62 he stated that:

\[\ldots (L')\text{assemblé nationale n'acceptera jamais c'est ce qu'elle a dit, que ses pouvoirs ou ses droits soient touchés sans son consentement \ldots c'est dans ce sens que s'explique la loi no. 62 comme étant un refus global de cette attitude d'agression constitutionnelle de la part du fédral en ce qui a trait aux droits et pouvoirs de l'Assemblée nationale.}\]

(Emphasis added.)

If this is the purpose motivating the enactment it could easily be characterized as an attempt by the government to invoke section 33 as a means of denying or lessening the effect of the agreement which resulted in the passage of the Constitution Act, 1982 without Quebec's support. In this case, it would be hard to imagine any court finding adequate justification for the Act.

Even if the Parti Québécois government would be justified in overriding certain Charter provisions which would frustrate valid legislative ambitions and even assuming that in these circumstances the legislation would be a demonstrably justified limit, it seems highly unlikely that a court would find that there is even a rational connection between the ends sought and the means employed by Bill 62.

A second motivation for Bill 62 is enunciated in its preamble as a desire to "fully preserve" the rights and powers of the National Assembly by making its acts subject only to the Québec Charter of Human Rights and Freedoms. A reading of the debates on the Bill discloses that the Justice Department of Québec believed that in certain areas the rights of Quebec citizens would be better protected if the Canadian Charter had no application whatsoever in Quebec. M. Bédard emphasized repeatedly the fact that certain rights not protected by the Canadian Charter are protected in the Quebec Charter. One such right is the right to equality before the law which is guaranteed in section 10 of the Quebec Charter. M. Bédard concluded that "la Charte des droits et
libertés de Québec protège mieux et plus, en termes de nombres de droits que la Charte constitutionelle." 82

If the purpose of the revision was to preserve statutory rights of Quebec citizens, the court might find it to be justifiable. However, applying even the loosest test of what constitutes a reasonable limit, the legislation will almost certainly be struck down. It is submitted that there is not even a rational connection between the end or purpose of securing previous rights for Quebeckers and the means employed. Section 26 of the Charter provides that the Charter is not to deny the existence of any other rights or freedoms including those antedating its proclamation. 83 As such, those rights not covered by the Charter which were enjoyed previously would continue to be enjoyed after the proclamation of the Charter. 84 Therefore, this argument does not provide a rational basis for overriding any Charter rights. In the result, the enactment has not fallen within the limits established by section 1 and must be held to be ultra vires.

B. The Rights Enumerated in Section 7 as a Limit on Legislative Override

The argument to be developed in this section is that legislation which has been fortified by an override declaration under section 33, as well as legislation such as Bill 62 which authorizes the indiscriminate overriding of rights and freedoms, may constitute a violation of the right to "life, liberty and security of the person" which is guaranteed in section 7 of the Charter and so may be invalidated on that basis. Section 7 provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. 85

In order for a court to employ the rights and freedoms enumerated in section 7 as a constraint on overriding legislation, the situation must be one in which the legislature has chosen not to override section 7 itself in the non obstante provision. If section 7 has been overridden by the legislature, it clearly cannot be invoked to invalidate the infringing legislation. Therefore, the argument would not apply to enactments which have been fortified with the override provision used in Bill 62. 86 Nor would the argument apply to Bill 62 itself, since section 5 of the Act specifies that "This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982". 87 Nevertheless, the argument may be applied in a situation in which section 7 has not been overridden.

As an example, we might refer back to the legislation at issue in the McNeil case discussed above. 88 If the provincial censorship scheme were struck

82 Supra note 78.
83 The Charter, supra note 5.
84 Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms With the Canadian Bill of Rights" in Beaudoin and Tarnopolsky eds., supra note 1, at 3.
85 The Charter, supra note 5.
86 Bill 62, supra note 14, s. 1.
87 Bill 62, supra note 14, s. 5.
88 See text accompanying notes 63-67, supra.
down as a violation of the right to free expression in section 2 of the Charter,
the legislature would likely re-enact it with the aid of an override declaration
under section 33 referring to section 2. The legislation might then be challenge-
ed on the basis that, notwithstanding the override provision, it constitutes a
deprivation of the right to free expression embodied in the concept of liberty,
which is not in accordance with the principles of fundamental justice.

In order for a court to find in favour of the applicant, it must be convinc-
ed of two propositions: The first is that the right to “life, liberty and security
of the person” incorporates within it the rights embodied elsewhere in the
Charter or otherwise recognized as fundamental and implicit in the right to
“liberty”. The second is that the “principles of fundamental justice” must be
interpreted as embodying more than the traditional procedural rules of natural
justice, since those rules have never been immune from legislative alteration or
abolition.

At the outset the court should be encouraged to give a “large and liberal
interpretation”\(^8\) to the constitutional rights found in section 7 of the Charter. As recently as 1979 the Privy Council reaffirmed that a constitutional bill of
rights calls for “a generous interpretation avoiding what has been called ‘the
austerity of tabulated legalism’, suitable to give individuals the full measure of
fundamental rights and freedoms referred to.”\(^9\)

1. The Right to Liberty in Section 7 Incorporates Rights Recognized
Elsewhere

Bearing this principle of constitutional interpretation in mind, the first
proposition, that a court must find incorporated within the concept of “liberty”
in section 7 rights which are recognized elsewhere, may be examined.

American courts have adopted this “incorporative approach” in
numerous decisions interpreting the due process clause located in the Four-
teenth Amendment of the Constitution of the United States of America. Under that clause, “[n]o state shall . . . deprive any person of life, liberty, or
property, without due process of law.”\(^1\) The United States Supreme Court
has employed this provision as a vehicle by which the rights of citizens which
are immune from legislative interference by the federal government have also
been granted immunity from state legislative abridgement.

The due process clause has been held to protect, inter alia:, the first
amendment freedoms of speech, press, assembly, and religion; the fourth
amendment right to be free of unreasonable search and seizure; the fifth
amendment rights to be free of compelled self-incrimination and double
jeopardy; the sixth amendment rights to counsel and speedy trial; and the
eighth amendment right to be free from cruel and unusual
punishment.\(^2\) All

3 W.W.R. 479 at 489 (P.C).


\(^1\) U.S. Const. amend. XIV, s. 1.

\(^2\) Supra note 53, at 568.
of these incorporations have been based on findings by the Supreme Court that these rights must be absorbed in the concept of liberty protected by the Fourteenth Amendment. In the words of Mr. Justice Cardozo: "the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."\(^\text{93}\)

In *Griswold v. Connecticut*\(^\text{94}\) the Supreme Court adopted an even broader view of the due process clause. In that case a Connecticut law prohibiting the use of birth control devices was struck down as a violation of the individual's right to privacy. Although right to privacy is nowhere explicitly guaranteed in the American Constitution, the majority held that it is recognized by the penumbra of the *Bill of Rights*. On that basis, it held the right to be "fundamental to the concept of liberty" and therefore protected by the due process clause of the Fourteenth Amendment.\(^\text{95}\)

In Canada the courts will not be concerned with the incorporation of substantive rights into the concept of liberty in section 7 as a means of securing the protection of these rights from provincial abridgement, since section 32 of the Charter already ensures the application of the Charter to both levels of government. Nevertheless, American decisions provide valuable precedent in deciding what values fall within the concept of liberty in section 7.

2. Interpretation of "The Principles of Fundamental Justice"

If Canadian courts adopt the American incorporative approach, section 7 may be employed to ensure that the rights falling within the concepts of "life, liberty, and security of the person" are not infringed except in accordance with the principles of fundamental justice. Infringements occurring as a result of section 33 enactments would be subject to judicial scrutiny. However, the extent of that scrutiny depends upon the scope given by the courts to the section 7 phrase "principle of fundamental justice".

The term is one of little familiarity in Canadian jurisprudence. It does appear in section 2(e) of the *Canadian Bill of Rights*,\(^\text{96}\) but has rarely been interpreted. In *Duke v. The Queen*\(^\text{97}\) Fauteaux C.J.C. stated that he "would take

\(^{93}\) *Palko v. Conn.*, 381 U.S. 319 at 326 (1937), 58 S. Ct. 149 at 152.

\(^{94}\) 381 U.S. 479 (1965), 85 S.Ct. 1678.

\(^{95}\) The notion of "incorporating" *Bill of Rights* provisions because of their presence in the Bill of Rights is an indication that they are "implicit in the concept of ordered liberty" has often been criticized. Critics argue that the incorporation doctrine should neither be used to restrict the scope of the due process clause, nor to impose upon the States the requirements of the *Bill of Rights per se*. Rights, it is argued, must be protected because they are fundamental to liberty. What might be regarded as fundamental to liberty and therefore protected by the Fourteenth Amendment may, in certain circumstances fall short of the rights guaranteed in the *Bill of Rights*. Likewise, in certain circumstances rights protected by the *Bill of Rights* may not necessarily be regarded as implicit in the concept of liberty. The courts should use the rights expressed in the *Bill of Rights* as guidance toward what is fundamental, and therefore protected, but not as an exhaustive definition. See Harlan J. (dissenting) in *Duncan v. La.*, 391 U.S. 145 at 171-93 (1968), 88 S.Ct. 1444 at 1460-472; *Poe v. Ullman*, 367 U.S. 497 at 543 (1961), 81 S.Ct. 1752 at 1776-777; *Griswold v. Conn.*, supra note 59, at 449-503 (U.S.), 1690-691 (S.Ct.).


them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias, and in a judicial temper. . . ."  

This definition closely approximates that of the term "natural justice" which is well established in our law. Professor Tarnopolsky has suggested this interpretation.

The concept of natural justice relates principally to rules of procedure. It is akin to what has become known as "procedural due process", which dictates that the procedures used in carrying out governmental actions must be fair and not arbitrary. Dr. Strayer gave support to this interpretation in testimony before the Special Joint Committee on the Constitution. He stated that "[i]t was [the drafters'] belief that the words 'fundamental justice' would cover the same thing as what is called procedural due process, that is, the meaning of due process in relation to requiring fair procedures."

If this definition is adopted, the courts will limit their inquiry to a review of the fairness of procedures adopted for a deprivation of life, liberty and security of the person.

If the courts instead find that the phrase "principles of fundamental justice" carries with it some substantive meaning, the results would be different. A court would examine the policy and overall fairness of the limitation imposed on the rights incorporated in section 7. This substantive approach has been taken by the American courts in interpreting the due process provisions of the Fifth and Fourteenth Amendments.

3. Application of Section 7 to a Use of Section 33

How would each of these formulations be applied to scrutinize infringements on section 7 rights resulting from the invocation of section 33 in respect of other rights in the Charter? If the principles of fundamental justice are read as having a substantive content, a reviewing court will require justification for the use of section 33. The court will weigh the overall policy of the law and will be satisfied that the requirements of fundamental justice have been met only after it has been established that the deprivation resulting from section 33 is fair in the sense that it is necessary for the execution of a justified legislative purpose. In this sense the analysis would be similar to that undertaken by a

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98 Id. at 923 (S.C.R.), 134 (D.L.R.), 479 (C.C.C.).
99 See generally, Mullan, Administrative Law (Toronto: Carswell, 1979) at 3-109 et seq. The rules of natural justice in general require that persons affected by a decision be given a reasonable opportunity to present their case in a hearing and that the decision-maker must listen fairly to both sides and must reach an unbiased decision.
100 The Canadian Bill of Rights (Toronto: McClelland & Stewart, 1975) at 264.
102 Under the model of substantive due process American courts have adopted a particularly activist approach to judicial review, scrutinizing the wisdom and justification of legislation infringing on rights protected as implicit in the concept of liberty or otherwise protected under the due process provisions of the Fifth and Fourteenth Amendments. See generally, Tribe, supra note 53, at 421-55, 886-990.
court in an assessment of whether a section 33-fortified enactment violated or complied with section 1 of the Charter.\textsuperscript{103}

If, instead, "fundamental justice" is interpreted as embodying only procedural guarantees, the court will be far less prone to interfere with the use of section 33. It will refuse to examine the reasons for invoking the override provision and will require no other substantive justification. Only the procedures by which section 33 was invoked and the actual procedures employed in the fortified legislation would be subject to review.

It is submitted that the language of section 7 places an obligation on a legislative body when enacting legislation restricting the rights implicit in life, liberty and security of the person to do so in a manner consistent with procedural fairness. This applies particularly to enactments similar in nature to \textit{Bill 62} whose sole purpose is to enable the limitation of rights and freedoms. Where the enactment is one which indiscriminately overrides the rights in sections 2 or 8 to 15 without regard by the legislating body to the reason for doing so in each separate legislative context, it might constitute a violation of liberty which fails to accord with the "principles of fundamental justice".

Another obligation which may be regarded as being placed upon the legislative body by section 7 is the obligation to ensure that the procedures established in otherwise valid legislation which restricts the rights embodied in section 7 are in accordance with the principles of fundamental justice. In this sense the Charter represents a departure from the common law in that it is a violation of the rights in section 7, not the nature of the function envisaged by the legislature for the tribunal to exercise, which determines the threshold beyond which the rules of natural justice, to the extent that they form an element of "the principles of fundamental justice", must be observed. Thus, where the rights included in life, liberty or security of the person are subject to determination by a legislatively established tribunal, the legislation must provide that natural justice be observed; the legislative body may not provide otherwise unless by declaration overriding section 7 of the Charter. The result is that while a legislative body may enact legislation which limits the rights and freedoms in sections 2 and 8 to 15 with the aid of a declaration made pursuant to section 33, to the extent that those rights are implicit within section 7, and in the absence of a declaration under section 33 referring to section 7, the legislation must be enacted in a procedurally fair manner and if there is an adjudicating tribunal established by the legislation, it must observe the rules of natural justice.

Returning again to the \textit{McNeil} example,\textsuperscript{104} the applicant would argue that even though section 33 has been employed to permit the legislature to restrict his freedom of expression, to the extent that freedom of expression is embodied in the concept of "liberty" protected by section 7, the legislature must establish procedures which accord with the principles of fundamental justice. If the legislation fails to establish such procedures then it must be found to violate section 7, notwithstanding that it was enacted with a provision overriding section 2.

\textsuperscript{103}See text accompanying notes 62-67, \textit{supra}.  

\textsuperscript{104} \textit{Supra} note 88.
C. "Entrenchment by Executive Action"

Professor Scott proposes a rather unorthodox method of curtailing the scope of the override power which involves control not by the judiciary but by the executive branch of government. In a recent article, he suggests an "across the board" curtailment of executive power to assent to bills with override clauses. Such a scheme would be accomplished by altering the Letters Patent of the Governor-General of Canada and of the Lieutenant-Governors of the provinces.

The possibility of such a scheme is indeed intriguing. However, the inherent dangers are obvious. Surely the re-institution of what has become an antiquated reminder of the colonial origins of our constitution is a step backward that answers one problem by creating an even more serious one. Once interference with the will of the majority is legitimized with respect to enactments which override constitutional rights, what is to prevent an increase in Sovereign interference with any legislation which displeases it? If the price of entrenchment of rights and freedoms is incapacitation of the democratic system of government, it is submitted that perhaps it is too much to pay.

D. The Language of Section 33

A final limitation on the employment of section 33 which might render Bill 62 unconstitutional is found in the language of section 33 itself. Section 33 specifies that the legislature "may expressly declare in an Act . . . that the Act . . . shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." (Emphasis added.) The language seems clear enough to require that the legislature insert, into each act which purports to override a provision of the Charter, a clause specifying precisely which provision is sought to be overridden. What is contemplated in the language of section 33 is that its use will be recognized in each instance. As Professor Gold stated in reference to the non obstante clause found in the Canadian Bill of Rights, one of the purposes of such a provision is that:

[It] forces Parliament to come out of the closet if it chooses to re-enact the legislation in question. It will force Parliament to give a clear statement of its justification for pursuing that policy, and thus enhance the accountability of Parliament to the public at large.

In the words of Mr. Borovoy, legal counsel to the Canadian Civil Liberties Association: "[t]he notwithstanding clause will be a red flag for opposition parties and the press . . . that will make it politically difficult for a government to override the Charter." Bill 62 defies the language of the Charter and the purposes underlying it in two respects. Firstly, the legislation is colourable. It attempts to do indirectly, by referentially revising each statute to incorporate a notwithstanding provision, what it could not do in a simple declaration that all laws of Quebec are to operate notwithstanding sections 2 and 7 to 15 of the

105 Supra note 10.
106 The Charter, supra note 5.
107 Gold, Equality Before the Law in the Supreme Court of Canada: A Case Study (1980), 18 Osgoode Hall L.J. 336 at 358.
108 The Globe and Mail (Toronto), Nov. 7, 1981 at 12, col. 5.
Charter. The requirement in section 33 that Parliament or a legislature must declare in an act that the act shall operate notwithstanding the sections of the Charter referred to, directs an examination by the legislature of each individual act. The words in section 33 point to a clear conclusion that the annexing of a non obstante provision to an existing statute must be a calculated response to an individual problem which frustrates the particular act or provision referred to.

The second failing of Bill 62 in this respect is that it purports to revise each statute to include a provision allowing that statute to exist notwithstanding sections 2 and 7 to 15. Once again, the singular and alternative language of section 33 authorizes no such enactment. The section requires that a non obstante clause shall specify that the Act or a provision thereof shall operate notwithstanding a provision sought to be overridden in section 2 or sections 7 to 15. The province may not indiscriminately override several sections or even several provisions within one section with one enactment; it must, in a separate override clause, specify a provision included in a section of the Charter which is to be overridden.

The textual arguments lead to the conclusion that section 33 requires a much greater degree of specificity than has been used in Bill 62. In the result, even if the statute were in all other respects valid, it should be struck down on these grounds.

IV CONCLUSION

The passage of the Canada Act 1982 represents the genesis of a new paradigm in Canadian constitutional law, a paradigm in which the existence of rights and freedoms delineates the bounds of legislative action, not the reverse. Our courts have been given the power and the responsibility by virtue of the entrenchment of rights and freedoms in the Canadian Charter of Rights and Freedoms, to vindicate the rights of individuals and minorities in the face of legislative abridgement. That power must be exercised with reference to, but not necessarily in unconditional deference to the constitutional privileges reserved to the legislatures to enact restrictive legislation for the general welfare of the majority.

In this system of entrenched rights and freedoms it is the courts, not the legislative bodies which must determine the balance to be reached between the rights of the minority, as protected by the Charter, and the prerogative of the majority, as preserved by section 33 of the Charter. In reaching this balance the courts should recognize that the power to override rights and freedoms is only one element in a formula which includes the express entrenchment of those freedoms. An interpretation of the Charter as representing a system of quasi-entrenchment in which the courts determine the limits of protected rights and freedoms, subject to the power of a sovereign legislative body would frustrate the rationale underlying the entrenchment of those rights and freedoms and would result in a failure to establish that equilibrium which represents the community values which the Charter so ambitiously aspires to express.